

ISSUES

All issues between the claimant and respondent were compromised and settled by agreement of the parties. The settlement was approved and award redeemed by hearing before Special Administrative Law Judge Robert Van Cleave on February 11, 1993. The Kansas Workers Compensation Fund joined in that settlement, including the reasonableness thereof, reserving only the issue of Fund liability. The sole issue remaining for determination by the Appeals Board then is: What is the liability, if any, of the Kansas Workers Compensation Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant, at the time of his December 9, 1992, Regular Hearing testimony, was a fifty-one (51) year old man who had been with ANR Freight System for over twenty-nine (29) years as a truck driver. On November 25, 1991, he slipped on ice and fell against a building, injuring his right shoulder. He immediately had a burning and stinging pain and could hardly move his right arm. He had previously sustained a ruptured biceps tendon injury to his right arm while in the course of his employment with respondent.

Claimant was initially treated by the respondent's regular industrial medicine physician, Dr. Mary Centner Brothers. An MRI scan of the shoulder was obtained which showed an occult fracture of the greater tuberosity of the humerus. Dr. Brothers then referred claimant to Dr. Larry Frevert. An arthrogram x-ray showed a rotator cuff tear for which Dr. Frevert performed surgery in January 1992. He did extensive surgery to the right shoulder, both to repair the rotator cuff tear and to take care of the old biceps tendon rupture. Dr. Frevert also removed the outer portion of the clavicle to open up the shoulder to get the impingement out of the shoulder and to relieve the problem with bone spurs. Claimant then went through a period of physical therapy following which he returned to work.

Mr. Bailey testified that he had a prior workers compensation claim resulting from the biceps tendon injury which occurred in the fall of 1989 while working for ANR Freight System. Respondent was aware of his prior injury and workers compensation claim. Respondent had provided medical treatment for that injury, first with Dr. Brothers and then with Dr. Boylin who is in the same office as Dr. Frevert. He described his 1989 injury as a rupture of the biceps tendon which is located in the upper arm. His current problems he described as primarily in the right shoulder. According to claimant, there is no comparison between his current injury and his prior injury because with the old injury it was more or less just the biceps area where he had some loss of strength and periodic numbness and tingling in his hands and fingers. Following the more recent injury he could hardly move his arm and even now can not lift it without experiencing tingling and numbness in his hand. The prior injury to the biceps resolved itself to where he could return to his regular job, where as now he is working with accommodations.

The deposition of the treating surgeon, Dr. Frevert, was not taken although certain of his records are in evidence. The deposition of Mary Centner Brothers, M.D., was taken on behalf of respondent. Dr. Brothers is a Fellow in the American College of Occupational and Environmental Medicine and a Fellow in the American Academy of Disability Evaluating Physicians. She had a residency in general surgery with some experience in orthopedic surgery although she is not an orthopedic surgeon. She also took a mini-residency in occupational medicine. Her medical practice is primarily occupational medicine. Dr. Brothers testified that she referred claimant to Dr. Larry Frevert after an MRI scan of the shoulder was done in November 1991 and did not see him again until November 1992 which was an examination for rating purposes. She rated claimant as possessing a twelve percent (12%) impairment of the body as a whole, three percent (3%)

of this rating being for thoracic outlet syndrome. In her opinion, claimant did have a pre-existing physical impairment of the right upper extremity and shoulder. The pre-existing biceps rupture predisposed him to injure himself more easily than if he had a completely normal shoulder. In addition, he had an impingement syndrome and spurring which pre-existed the accident of November 1991. This impingement and spurring also predisposed the shoulder to injury because the impingement spurring caused a rubbing on the tissue that led to thinning and irritation of the tissue and scarring. However, in her opinion, the rotator cuff changes were probably a parallel but somewhat separate condition from the impingement syndrome because the rotator cuff is in a slightly different location from the area where one typically gets spurs. She would say that the orthopedic surgeon who saw the tissue at surgery would be best able to give an opinion concerning the relationship of the pre-existing spurring to the rotator cuff tear. Unfortunately, as previously noted, the testimony of Dr. Frevert was not taken. It was Dr. Brothers' impression that claimant's previous diagnosis and treatment did have some impact on the likelihood of his injuring his shoulder from the subject trauma because in the treatment of his prior biceps rupture he had been given steroid injections which can sometimes lead to thinning and irritation of the tendon and make it more likely to rupture or tear. In addition, the rotator cuff was more likely to tear due to the fact that claimant had pre-existing spurs. She would say that there was probably a fifty-fifty (50/50) relationship between the pre-existing condition and the present condition. However, that opinion was not given to a reasonable degree of medical probability but was instead what she described as "guesstimated."

The deposition of Edward J. Prostic, M.D., was taken on behalf of claimant. He is a board-certified orthopedic surgeon who examined claimant at the request of his attorney. In his opinion, claimant sustained a rotator cuff tear and thoracic outlet syndrome as a result of his November 1991 fall. The shoulder condition was complicated by the pre-existing tear of the long head of the biceps tendon. That is a condition which pre-existed the accident but which made the biceps tendon more vulnerable to tear and was capable of causing problems at the rotator cuff. It was also his opinion that an anterior impingement syndrome pre-existed the accident. Dr. Prostic does not think that the biceps tendon rupture predisposed claimant to a rotator cuff injury but that the same process which allowed the biceps tendon to rupture predisposed claimant to the rotator cuff injury. The same spur that caused problems to the biceps tendon and enabled it to rupture most likely irritated the rotator cuff, facilitating the rupture of the rotator cuff. Thus, the pre-existing spurring that had to do with the initial tear of the biceps tendon also predisposed claimant to have the tear of the rotator cuff. It was the opinion of Dr. Prostic that more probably than not the rotator cuff would not have torn but for the pre-existing spur which was a pre-existing impairment in the shoulder. In his opinion, claimant has a twenty-five percent (25%) impairment to the body as a whole of which approximately three percent (3%) of the twenty-five percent (25%) impairment rating would be for the thoracic outlet syndrome. The pre-existing biceps rupture, however, did not have anything to do with the thoracic outlet syndrome so three percent (3%) of the twenty-five percent (25%) impairment rating would not be related to the pre-existing condition. Nevertheless, in his opinion the tear of the rotator cuff probably would not have occurred but for the pre-existing impingement syndrome.

It is upon this testimony that the Appeals Board relies in finding the Kansas Workers Compensation Fund one-hundred percent (100%) liable for the claimant's present disability, not including the three percent (3%) impairment attributable to the thoracic outlet syndrome. Both Dr. Brothers and Dr. Prostic agree that three percent (3%) of their respective ratings were attributable to the thoracic outlet syndrome which Dr. Prostic specially excluded from his "but for" opinion.

At oral argument, both counsel for respondent and counsel for the Fund agreed that the three percent (3%) impairment attributable to the thoracic outlet syndrome would not be the responsibility of the Fund. However, there was a disagreement as to how this three percent (3%) impairment should be treated. Respondent argued that the three percent (3%) disability should be deducted from the eighteen and one-half percent (18.5%) disability award, making the Fund liable for a fifteen and one-half percent (15.5%) disability. The Fund disagreed, saying that the three percent (3%) should be calculated as a percentage of the eighteen and one-half percent (18.5%) disability rating and that percentage then deducted from the lump sum awarded claimant. Under the facts and circumstances of this case, we agree with the argument put forth by the Fund with respect to the treatment of the three percent (3%) impairment attributable to the thoracic outlet syndrome. This is due primarily to the fact that the amount paid claimant represented a redemption of a compromised settlement and does not equate precisely to the eighteen and one-half percent (18.5%) disability upon which the settlement was said to be based, this sum being an average of the ratings given by the two physicians offering opinions in this regard. This discrepancy may in part be attributable to the credit for the prior award for the biceps tendon rupture as was stated by counsel for the respondent at the redemption hearing. By this same reasoning, we reject the argument put forth at oral argument that the Fund is somehow entitled to a credit for that prior award. The Fund acquiesced in the reasonableness of the settlement paid claimant at the redemption hearing and cannot now argue that that sum should somehow be discounted by a credit. The claimant is no longer a party to the action and the credit issue was clearly a factor in the overall settlement to which the Fund acquiesced and agreed and that issue is deemed waived.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert E. Foerschler should be, and hereby is modified in that the Kansas Workers Compensation Fund should reimburse the respondent and its insurance carrier for eighty-four percent (84%) of the cost of the February 11, 1993 Settlement Award Redemption, including temporary total and permanent partial disability compensation, medical and hospital expenses, court reporter fees and fee of the Special Administrative Law Judge.

The Appeals Board hereby adopts and approves the remaining findings and orders of the Administrative Law Judge to the extent they are not inconsistent with this Order.

IT IS SO ORDERED.

Dated this ____ day of November, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark E. Kolich, Kansas City, KS
James E. Phelan, Kansas City, KS
Robert E. Foerschler, Administrative Law Judge
George Gomez, Director